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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 667.

ATLANTIC CLEANERS AND DYERS, INC., ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA.

ON APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF OF APPELLANTS.

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I.

The Opinion of the Court Below.

The final decree of the Supreme Court of the District of Columbia was entered on the 5th day of November, 1931 (R. 23-24) without opinion. In denying the motions of appellants to dismiss the petition, the court below, on July 24, 1929, filed a four-line memorandum opinion (R. 11), which is not reported.

II.

Statement of the Case.

This is an appeal by the defendants below from a decree of injunction of the Supreme Court of the District of Columbia (R. 23-24) in favor of the plaintiff in a suit in equity described in the petition as "brought by the United States of America to prevent the defendants from further engaging in and carrying out in the District of Columbia a combination and conspiracy in restraint of trade and commerce in the District of Columbia in violation of the Act of Congress of July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' and of the common law." (Petition, R. 3)

The business in which the appellants are engaged and to which the alleged restraint was applied is described in the Government's petition as follows:

> "The * * * defendants * * * are engaged in * * * the business of cleaning, dyeing, and otherwise renovating clothing in the District of Columbia, at plants located therein, principally at wholesale and as master cleaners and dyers, and in pursuance of contracts and engagements between them and so-called retail dyers and cleaners; that is to say, with persons and corporations in the District of Columbia who are engaged in the business of, and who maintain stores or shops in said District for, receiving from the public clothing to be cleaned, dyed or otherwise renovated." (R. 2-3)

The means averred in the petition to have been agreed upon and used by the appellants in imposing the alleged restraint are the raising of prices and the assigning and allotting of customers in the performance of said "service". (R. 3-4)

Motions were interposed by the defendants to dismiss the petition on grounds which may be summarized as that the petition does not state a cause of action in equity and that it appears on the face of the petition that the defendants are not engaged in trade or commerce within the meaning of the Sherman Anti-Trust Act or of the common law. (R. 5-11) These motions were denied, the trial justice announcing his decision in a four-line memorandum opinion. (R. 11)

The case came on for hearing on the motion of the United States to strike the amended answers of the defendants (appellants here) on the ground "that said amended answers are insufficient in law to constitute a defense to the cause of action alleged in the petition." (R. 22)

These amended answers are in substantially the same form (R. 12-21), and therein the respective defendants (appellants here) admit that they and the other defendants have been and are engaged in the business of cleaning, dyeing and otherwise renovating clothing in the District of Columbia, at plants located therein, in part, in pursuance of contracts and engagements between them and so-called retail cleaners and dyers; and deny that they and the other defendants together do substantially all of the business of cleaning, dyeing or otherwise renovating clothing in the District of Columbia; and affirmatively allege that there are many persons other than the defendants in said suit who are engaged in the business of cleaning, dyeing and otherwise renovating clothing in the District of Columbia, and aver, on information and belief, that these other persons do at least one-half of the said business in the District of Columbia. (R. 12-21) The amended answer of Vogue Dry Cleaning Company, a corporation, and Samuel Goldenberg, specifically denies that the said Vogue Dry Cleaning Company is engaged principally in business as a wholesaler. (R. 19)

The amended answers of the respective defendants further deny that they have been or are, within the District of Columbia or elsewhere, engaged in a combination or conspiracy in restraint of trade or commerce, and specifically deny that they have been or are now engaged in trade or commerce. (R. 13, 15, 17, 19, 21) Said amended answers neither admit nor deny the allegations of the petition in regard to the alleged means employed to impose the charged restraint. (R. 13, 15, 17, 19, 21)

Affirmatively, said amended answers of the respective defendants aver "that the business of dry cleaning and dyeing, in which they are engaged, and to which the charges in said petition relate, consists solely of the performance of labor and the rendering of a service in cleaning, dyeing, and, or renovating wearing apparel and other articles which have passed into the hands of the ultimate consumer thereof, and is not trade or commerce within the meaning of the Act of Congress of July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies' or of the common law." (R. 13, 15, 17, 19, 21)

The court below granted the motion of the Government to strike said amended answers on the ground that they were insufficient in law to constitute a defense to the cause of action alleged in the petition (R. 23) and, defendants (these appellants), electing to stand upon said amended answers, the court entered a final decree of injunction as prayed for in the petition, (R. 23-24) from which decree this appeal was thereupon duly taken. (R. 25-26) (See statement as to jurisdiction on appeal heretofore filed herein.)

III.

The Statute.

The pertinent provisions of the Sherman Anti-Trust Act, being the Act of Congress of July 2, 1890, Chap. 647, 26 Stat. 209 (15 U. S. C., Secs. 1, 3, 4) are as follows:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." * * * *

"Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal." * * *

"Sec. 4. The several circuit (district) courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited." * * *

IV.

Specification of Errors.

The appellants have assigned as reversible error that the Supreme Court of the District of Columbia erred in the following respects and particulars:

1. In denying defendants' motions to dismiss the plaintiff's petition and in holding that said petition states a cause of action against these defendants or any of them under the Act of Congress approved July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," or under the common law.

2. In holding that defendants' amended answers are insufficient in law to constitute a defense to the alleged cause of action set forth in plaintiff's petition and in

granting plaintiff's motion to strike said amended answers.

3. In holding that the business or service of cleaning, dyeing and/or renovating wearing apparel or other articles which have passed into the hands of the ultimate consumer thereof, in which these defendants are engaged and to which the charges in plaintiff's petition relate, is trade or commerce under the Act of Congress approved July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," or under the common law.

4. In entering the decree of injunction herein against these defendants or any of them. (R. 25-26)

Appellants rely on all of the errors assigned, but if appellants are correct in their understanding that there is no contention on the part of the United States that this suit may be maintained under the common law independently of the Sherman Anti-Trust Act, then a single question is presented in this appeal which may be thus stated:

Is the business or service of cleaning, dyeing and/or renovating wearing apparel or other articles which have passed into the hands of the ultimate consumer thereof, in which these appellants are engaged and to which the charges in the Government's petition relate, trade or commerce under the said Sherman Anti-Trust Act?

V.

Argument.

Summary of Argument.

Point A. "Trade or commerce", as used in the Sherman Anti-Trust Act, does not embrace activities or occupations not included in the term "commerce" as used in the commerce clause of the Constitution.

Point B. It has been settled by decisions of this court that many lines of business are not "commerce" as that term is used in the commerce clause of the Constitution.

Point C. "Trade or commerce", as used in the Sherman Anti-Trust Act, connote the transfer of something, whether it be persons, commodities or intelligence, from one place or person to another.

Point D. The business of dry cleaning and dyeing here involved consists solely of the performance of labor and the rendering of a service in cleaning, dyeing and/or renovating wearing apparel and other articles which have passed into the hands of the ultimate consumer thereof and is not "trade or commerce" within the meaning of the Sherman Anti-Trust Act.

Point E. The use of the term "restraint of trade" by courts in passing upon the enforceability of restrictive covenants affecting various businesses, occupations and professions is no support for the contention that such businesses, occupations or professions are "trade or commerce" within the meaning of the Sherman Anti-Trust Act.

Point A.

"Trade or commerce," as used in the Sherman Anti-Trust Act, does not embrace activities or occupations not included in the term "commerce" as used in the commerce clause of the Constitution.

It is, of course, settled that the power of Congress to enact Section 1 of the Sherman Anti-Trust Act rests solely on the commerce clause of the Constitution (Art. I, Sec. 8, Clause 3) which empowers Congress "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

In *Blumenstock Brothers Advertising Agency v. Curtis Publishing Co.*, 252 U. S. 436, 441, this court said: "The Anti-Trust Act, it is hardly necessary to say, derives its authority from the power of Congress to regulate commerce among the States."

It therefore necessarily follows that "trade or com-

merce" as used in Section 1 of the Act cannot be broader than "commerce" as used in the commerce clause of the Constitution.

While the power of Congress to legislate for the District of Columbia does not rest on the commerce clause of the Constitution but on the plenary power of Congress to legislate for said District, yet in Section 3 of said Act Congress has used the identical language in describing things prohibited within the District of Columbia that it has used in Section 1 in describing the things prohibited among the several States. Furthermore, Section 3 goes on to prohibit the same things between the Territories, or between a Territory and a State, or between the District of Columbia and any Territory, State or foreign Nation.

We know of no intimation in any decision that Congress, in using the term "trade or commerce" in the first section of the Act went beyond the power given it under the commerce clause of the Constitution. Nor has it even been held, so far as we know, that said term as so used must be narrowed in order to bring that section within the Constitutional power of Congress.

Certainly it seems to follow that "trade or commerce" as used in the third section of the Act has exactly the same meaning as in the first section of the Act, and consequently must come within the meaning of "commerce," as used in the commerce clause of the Constitution.

It thus becomes relevant to determine what is or is not "commerce" within the meaning of the commerce clause of the Constitution.

Point B.

It has been settled by decisions of this Court that many lines of business are not "commerce" as that term is used in the commerce clause of the Constitution.

The business of insurance is not commerce.

Paul v. Virginia, 8 Wall. 168, 183:

"Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration."

Hooper v. California, 155 U. S. 648, 655:

"The business of insurance is not commerce."

New York Life Insurance Co. v. Deer Lodge County, 231 U. S. 495, 510:

"The decisions of the cases is that contracts of insurance are not commerce at all, neither state nor interstate."

Bothwell v. Buckbee, Mears Co., 275 U. S. 274, 276-277.

Manufacturing is not commerce.

Kidd v. Pearson, 128 U. S. 1, 20:

"No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The

buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation."

United States v. E. C. Knight Co., 156 U. S. 1, 12:

"Commerce succeeds to manufacture, and is not a part of it."

Hammer v. Dagenhart, 247 U. S. 251, 272:

"Commerce 'consists of intercourse and traffic * * * and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities.' The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped, or used in interstate commerce, make their production a part thereof."

Crescent Cotton Oil Co, v. Mississippi, 257 U. S. 129, 136:

"The separation of the seed from the fiber of the cotton, which is accomplished by the use of the cotton gin, is a short but important step in the manufacture of both the seed and the fiber into useful articles of commerce, but that manufacture is not commerce was held in *Kidd v. Pearson*, 128 U. S. 1, 20; *United States v. E. C. Knight Co.*, 156 U. S. 1, 12, 13; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 245; *McCluskey v. Marysville & N. R. Co.*, 243 U. S. 36, 38; and in *Hammer v. Dagenhart*, 247 U. S. 251, 252; *Arkadelphia Mill Co. v. St. Louis Southwestern R. Co.*, 249 U. S. 134, 151, 152."

United Leather Workers' International Union v. Herkert & Meisel Trunk Co., 265 U. S. 457, 465.

Mining is not commerce.

Delaware, L. & W. R. Co. v. Yurkonis, 238 U. S. 439, 444-445.

Hammer v. Dagenhart, 247 U. S. 251, 272, *supra.*

The ginning of cotton is not commerce.

Crescent Cotton Oil Co. v. Mississippi, 257 U. S. 129, 136, *supra.*

The refining of sugar is not commerce.

United States v. E. C. Knight Co., 156 U. S. 1, 12, 17, *supra.*

The making of contracts for advertising in periodicals is not commerce.

Blumenstock Brothers Advertising Agency v. Curtis Publishing Co., 252 U. S. 436, 442:

"The advertising contracts did not involve any movement of goods or merchandise in interstate commerce, or any transmission of intelligence in such commerce."

Rendering commercial credit reports beyond state lines is not interstate commerce.

United States Fidelity & Guaranty Co. v. Kentucky, 231 U. S. 394, 398.

The business of organized baseball is not commerce.

Federal Baseball Club v. National League of Professional Baseball Clubs, 259 U. S. 200, 208-209.

We now pass to a consideration of affirmative definitions of "trade or commerce" as used in the Sherman Anti-Trust Act.

Point C.

"Trade or commerce," as used in the Sherman Anti-Trust Act, connote the transfer of something, whether it be persons, commodities or intelligence, from one place or person to another.

"Trade or commerce," as used in the Sherman Anti-Trust Act have, jointly and singly, been the subject of definition in a multitude of cases in this Court and in the

lower Federal courts. No useful purpose would be served in reviewing all these cases, but we may say that in not one have we found a definition which would include the business of these appellants.

In holding that the business of organized baseball is not trade or commerce within the Sherman Anti-Trust Act, the Court of Appeals of the District of Columbia, in *National League, etc. v. Federal Baseball Club*, 50 App. D. C. 165, 168, said:

> "'The word "trade," in its broadest signification, includes, not only the business of exchanging commodities by barter, but the business of buying and selling for money; or commerce and traffic generally.' *May v. Sloan*, 101 U. S. 231, 237 (25 L. Ed. 797). It means 'the buying as well as the selling of property.' *United States v. United States Steel Corporation, et al.* (D. C.), 223 Fed. 55, 177. Webster's Dictionary defines trade as 'the act or business of exchanging commodities by barter; the business of buying and selling for money; commerce; traffic; barter'—and says that 'Commerce, in its simplest signification, means exchange of goods. * * * It may be said to be trade, traffic, or exchange between different places and communities.' And according to the Century Dictionary, commerce is defined as 'interchange of goods, merchandise or property of any kind; trade; traffic.' 'Commerce, briefly stated, is the sale or exchange of commodities.' *United States v. Swift & Co.* (C. C.), 122 Fed. 529. Substantially the same definitions are given in the cases of *United States v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; *Gibbons v. Ogden*, 9 Wheat. 1, 189, 190, 6 L. Ed. 23; *Gloucester Ferry Co. v Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158; *In re Charge to Grand Jury* (D. C.), 151 Fed. 834.
>
> Through these definitions runs the idea that trade and commerce require the transfer of something, whether it be persons, commodities, or intelligence, from one place or person to another."

In affirming the decision of the Court of Appeals of the District of Columbia, this court, in *Federal Baseball Club v. National League of Professional Baseball Clubs,* 259 U. S. 200, at 208-9, said:

> "The decision of the Court of Appeals went to the root of the case, and, if correct, makes it unnecessary to consider other serious difficulties in the way of plaintiff's recovery. * * * But we are of opinion that the Court of Appeals was right.
>
> The business is giving exhibitions of baseball, which are purely state affairs. It is true that, in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and states. But the fact that, in order to give the exhibitions, the League must induce free persons to cross state lines, and must arrange and pay for their doing so, is not enough to change the character of the business. According to the distinction insisted upon in *Hooper v. California,* 155 U. S. 648, 655, the transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money, would not be called trade or commerce in the commonly accepted use of those words. As it is put by the defendant, personal effort, not related to production, is not a subject of commerce. That which, in its consummation, is not commerce, does not become commerce among the states because the transportation that we have mentioned takes place. To repeat the illustrations given by the court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another state."

In *Thornton, Combinations in Restraint of Trade,* p. 167, the author says in discussing the Sherman Act:

> "No doubt the word 'trade' was here used in abundance of caution; for it is covered by the word 'commerce'. It is broad enough to cover every kind of ex-

change or dealing, but it is here used to denote the purchase or barter and sale of goods, wares and merchandise, either at wholesale or retail."

Point D.

The business of dry cleaning and dyeing here involved consists solely of the performance of labor and the rendering of a service in cleaning, dyeing and/or renovating wearing apparel and other articles which have passed into the hands of the ultimate consumer thereof and is not "trade or commerce" within the meaning of the Sherman Anti-Trust Act.

The decisions of this Court above cited under Point B, which conclusively settle that manufacturing is not commerce, hold that the circumstance that the article when manufactured will become an article of commerce does not have the effect of making the manufacture thereof a transaction of commerce. This principle is, *a fortiari*, applicable to the case at bar, which involves the cleaning and dyeing of articles not intended to be sold after having been cleaned or dyed, but which have passed out of the realm of commerce into the hands of the ultimate users thereof.

The question presented in this appeal has been before some of the State courts in connection with the laundry business.

In *Smith v. Jackson*, 103 Tenn. 673, the question was whether an agent of a laundry who collected garments and sent them out of the State of Tennessee to be washed and laundered and afterwards redelivered them to their owners, collecting the price of the entire service, was engaged in commerce so as to be protected by the interstate commerce clause of the Federal Constitution from the payment of the privilege tax imposed on agents for laundries by a Tennessee statute. The court, in holding that the agent was not engaged in commerce and hence was not exempt from the tax, said (p. 675):

"The word 'commerce' found in this clause cannot be held to embrace a transaction such as is here presented. It implies, when used by business men, as it is defined by Mr. Webster, the lexicographer, trade or traffic, as in the exchange of specific articles or commodities, or else of these for money or its representative. In a case like the present, nothing, in the true commercial sense, is sold or exchanged. The agent takes the articles committed to his care, and agrees with the owner that he will send them across the state line, and have certain labor bestowed on them, and, when returned, then he is to receive compensation equal to this labor. There is no commodity created, of which the ownership is changed. It is simply a personal contract based on a valuable consideration, having no element of a commercial transaction falling within the protection of this clause of the Constitution."

In *State v. Frank*, 114 Ark. 47, 56, in holding that an agreement between the owners of laundries to fix the price of laundry work is not within the operation of an Arkansas statute declaring it to be a conspiracy to become a party to an agreement to fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage, the court said:

"The business of laundering is a mere service done, whether performed by hand or by machinery, and an agreement to regulate the price to be charged therefor is in its last analysis merely an agreement to fix the price of labor or services, and the legislature of this state has not made such an agreement unlawful."

In *State v. McClellan*, 155 La. 38 (1924), it was held that the laundry business was not "trade" or "commerce" under a Louisiana statute which followed sections 1 and 2 of the Sherman Act and section 3 of the Clayton Act in

prohibiting contracts, combinations in the form of trust or otherwise, or conspiracies in restraint of trade or commerce or monopolization thereof, and hence that no prosecution lay under such statute for attempting to monopolize the laundry business in the city of New Orleans.

In discussing the case last above cited, the same court, in *Tooke & Reynolds v. Bastrop Ice & Storage Co.*, 172 La. 781, 795, said:

> "There are certain expressions in the opinion which seem to have been interpreted to mean that the court held that a monopoly can be created in no way except that stated in Section 4 of the Act. We shall not attempt to review those expressions. Suffice it to say that the court did not intend to so hold.
>
> The only question before the court with reference to monopolies was whether the laundry business is trade or commerce. Any expressions in the opinion not pertinent to that issue are *obiter dicta.*"

In *United States v. Fur Dressers' & Fur Dyers' Ass'n*, 5 Fed. (2d) 869, 872, the court in holding the Sherman Anti-Trust Act inapplicable to an association of fur dressers and fur dyers, in addition to other reasons given said:

> "The defendants neither buy nor sell furs. They only dress and dye furs belonging to others at their places of business. Dyeing and dressing furs do not constitute trade or commerce, but only the performance of labor."

State v. Duluth Board of Trade, 107 Minn. 506, was a proceeding in which the State of Minnesota sought to forfeit the corporate franchise of the Duluth Board of Trade, and restrain it and its officers from further transacting business under its then rule, on the ground that a provision of the said rule requiring members to charge uniform commissions for their services in making sales of grain for their customers violated the anti-trust statute of the State. That statute provided for the forfeiture of the corporate

franchise of a corporation violating its provisions, and is set forth at page 516, but it is not quoted here, for it is considered that its nature and scope is fully shown by the following extract from the opinion (page 517):

> "The Minnesota anti-trust law is framed along the line of the Federal statute, although it is more diffuse. It may fairly be assumed, however, that the general purpose of all statutes of this kind is the same, and we may therefore properly look to the decisions made under Federal and state statutes of a similar character for the principle by which to construe our own statute. *Minnesota v. Northern Securities Co.* (C.C.), 123 Fed. 692. The first clause or part of the statute prohibits agreements and combinations in restraint of trade, thus following the language of Sec. 1 of the Federal statute (act July 2, 1890, chap. 647, 26 Stat. at L. 209). This general language is then followed by provisions which specifically forbid combinations or agreements which tend in any way to limit, fix, control, maintain, or regulate the price or production of any article of trade, manufacture, or use, bought and sold within the state, or which prevent or limit competition in the sale or purchase of the same."

After a most extended discussion of the common law relating to monopolies and restraints of trade and of the Federal decisions under the Sherman Anti-Trust Act, and of State decisions under the various State anti-trust acts, the Supreme Court of Minnesota said (page 547):

> "Agreements to regulate the price of personal services, when standing alone, have never been held to be agreements in restraint of trade, and it is only when connected with other contracts and conduct which are in themselves illegal that they come within the purview of the Federal anti-trust law."

And the court held (page 550) "that combinations and agreements, the sole and only purpose of which is to fix the charges that shall be made for personal services are not within the prohibitions of the statute."

A case which has been cited as contrary to the views herein expressed is that of *Kansas City v. Seaman*, 99 Kans. 143. In that case the question was whether an employee of a Kansas City, Missouri, laundry who with a wagon gathered up linen of patrons of the laundry in Kansas City, Kansas, took it to the laundry, and when it was ready for delivery, returned the same to the patrons and collected the charges, was properly convicted of violating an ordinance of Kansas City, Kansas, imposing a license tax upon each laundry operated within the City. The court held that the conviction was unlawful, first, for the reason that the employee of the laundry company was not conducting a laundry within the City, and second, for the reason that collecting the articles in Kansas, carrying them into Missouri, and returning them to their owner after the service had been performed, was interstate commeree. It may be said of that case that the second reason given was unnecessary for the decision of the case; that the court rested its decision upon the transportation involved; and that the court placed an unsound construction upon the holding in *International Text Book Co. v. Pigg*, 217 U. S. 91, upon which it relied. This court has held that incidental transportation does not render a transaction interstate commerce which is not otherwise so, and has pointed out that the basis of the decision in *International Text Book Co. v. Pigg, supra*, was that interstate traffic in text books and apparatus was involved. *Hooper v. California*, 155 U. S. 648, 655; *Federal Baseball Club v. National League of Professional Baseball Clubs*, 259 U. S. 200, 209; *Blumenstock Brothers Advertising Agency v. Curtis Publishing Co.*, 252 U. S. 436, 442; *New York Life Insurance Co. v. Deer Lodge County*, 231 U. S. 495, 511; *United States Fidelity and Guaranty Co. v. Kentucky*, 231 U. S. 394, 398. As a further distinction, it may be pointed out that, in the case at bar, no transportation whatever is involved.

Some of the State anti-trust statutes expressly include labor and personal services. The policy of the United States in this respect, however, has been settled to the contrary, for it is provided in Sec. 6 of the Clayton Act (Act of Congress approved October 15, 1914, Chap. 323, 38 Stat. 730, 15 U. S. C., Sec. 17) "The labor of a human being is not a commodity or article of commerce," and Section 1 of said Act provides " 'Commerce' as used herein, means trade or commerce among the several states * * * or within the District of Columbia" (15 U. S. C., Sec. 12).

Point E.

The use of the term "restraint of trade" by courts in passing upon the enforceability of restrictive covenants affecting various businesses, occupations and professions is no support for the contention that such occupations or professions are "trade or commerce" within the meaning of the Sherman Anti-Trust Act.

At common law, the expression "restraint of trade" was and still is used by the courts in passing upon the enforceability of covenants restricting the activities of the covenantor in various businesses, occupations and professions. These covenants were more likely to be found in contracts relating to the sale of a business or in contracts of employment, but they have arisen in other connections. In passing upon the enforceability of such covenants—that was the way in which their validity arose at common law—there is no question but that the courts have used the phrase "restraint of trade" without distinction as to the nature of the business, occupation or profession of the covenantor; it making no difference whether he was a merchant, an artisan, a lawyer, a doctor or a dentist.

It was argued by the Government below that this use of the expression "restraint of trade" by the courts in such cases is the equivalent of a holding that every gainful occupation is "trade" under the Sherman Anti-Trust

Act because that Act was passed in the light of the common law.

We submit that such argument is not sound; first, because, for reasons hereinabove given, no construction can extend "trade or commerce" as used in the Sherman Anti-Trust Act beyond "commerce" as used in the commerce clause of the Constitution; and, second, because the use by the courts of the artful expression "restraint of trade" in passing upon the enforceability of a restrictive covenant is not the equivalent of holding that the covenantor is engaged in "trade."

For example, it is submitted that a holding by a court that an all-restrictive covenant by a dentist in selling his practice is not enforceable because unreasonably "in restraint of trade" does not establish that a dentist is engaged in "trade."

We do not believe "trade" had any such signification at common law any more than it has in common understanding, and we submit that it was not and could not have been so used in the Sherman Anti-Trust Act.

In this connection, it may be mentioned that the only relevancy in the cause at bar of the common law meaning of "trade" is in whatever aid it may lend to the interpretation of the Sherman Anti-Trust Act.

As suggested above, contracts in restraint of trade were not affirmatively illegal at common law, but were simply unenforceable. There is no common law right on the part of the United States to bring a suit to enjoin the performance of such contracts; and such right, as asserted in the suit at bar, rests solely on Section 4 of the Sherman Act. See *Thornton, Combinations in Restraint of Trade;* pp. 88, 690-692; *United States v. Agler,* 62 Fed. 824.

Thus, from whatever angle this case is viewed, the Government's suit should fail.

Conclusion.

It is, therefore, respectfully submitted that the decree of the Supreme Court of the District of Columbia was erroneous and should be reversed.

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